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IN THE

Supreme Court of the United States

September Term, 1960

No 261

In the Matter of

WARD LABORATORIES, INC., a corporation, and EMILE E. KLING and JOSEPH SELDIN, individually, and as officers of Ward Laboratories, Inc., and COMATE LABORATORIES, INC., a corporation, and SEBACIN, INC., a corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN J. SCHEIMAN
Counsel for Petitioners
Time & Life Building
New York 20, New York

307 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-3432

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Cases:

Alberty v. Federal Trade Commission, D.C. Cir., 1950, 182 F. 2d 36 — 3, 6, 7, 8

Erickson v. F. T. C., 272 F. 2d 318, cert. den. 362 U. S. 940 — 8

Loesch v. F. T. C., 266 F. 2d 560, cert. den. 361 U. S. 914 — 8

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Statutes:

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Federal Trade Commission Act, Sec. 12(a) 15 U. S. C. Sec. 55(a) — 3

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 27, 1960.

Citation of Opinion Below

The opinion of the Circuit Court of Appeals printed in the Appendix hereto is reported in 276 F. 2d 952.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 27, 1960. No application for a re-hearing was made. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. In the face of sharply contested expert testimony as to whether the great majority of cases of common baldness (sometimes termed "male pattern" baldness) is caused by age, heredity and endocrine balance, as contended by the Federal Trade Commission, or by scalp infection as contended by petitioners, a Federal Trade Commission order to cease and desist from allegedly false advertising is constitutional where it requires petitioners to incorporate in their advertisements, by way of affirmative disclosures, allegations that the great majority of cases of common baldness are due to those causes advanced by the Federal Trade Commission and that petitioners' products are ineffective in such cases, despite the fact that the Commission's witnesses themselves characterized their own testimony as the expression of scientifically unproven theories that were and are conjectural, controversial and disputed among highly respected medical authorities.

2. (a) Whether the affirmative disclosure requirement in this case is not an unjustified, unwarranted and unconscionable extension of the doctrine expressed in *Alberty* v. *Federal Trade Commission*, D.C. Cir., 1950, 182 F. 2d 36, and

(b) Whether such affirmative disclosure requirement does not in fact create an irreconcilable conflict between the decisions in the *Alberty* case and the case at bar.

Statute Involved

The pertinent statutory provisions involved are those portions of Sections 12(a) and 15(a) of the Federal Trade Commission Act, 52 Stats. 114, 15 U. S. C., Section 52, 55(a), reading as follows:

12(a)

"It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics."

15(a)

"The term 'false advertisement' means an advertisement, other than labeling, which is misleading in

a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisements, or under such conditions as are customary or usual * * *."

Statement

On May 5, 1955, the Commission issued its complaint charging petitioners with false advertising by representing that the common or significant cause of baldness is scalp infection, and that the use of their preparations would remedy such condition. The complaint, as amended, charged that the most common cause of baldness was heredity, age and endocrine balance rather than infection. The petitioners denied the charges against them, admitting only that their products would not remedy or prevent common baldness, grow new hair or prevent excessive hair fall except where those conditions were due to a condition known as "seborrhea".

On May 8, 1956, the parties entered into a stipulation that confirmed as facts all of the matter alleged in the amended complaint other than the causes of baldness as claimed by the Commission, the efficacy of the petitioners' remedies and the charges that the advertising complained of was in violation of law. Hearings were subsequently held during the period from May 24, 1956 to April 24, 1957.

Six medical doctors specializing in the field of dermatology were witnesses at such hearings. Four were called on behalf of the Federal Trade Commission and two on behalf of the petitioners. All of such witnesses admitted that dermatological science has not been able, with reasonable certainty, to identify the causes and origins of common baldness and that there are concurrently existing diverse theories held by respected members of the medical profession.

The theory advanced by the Commission's experts, in substance, is that the almost exclusive causes of common baldness are heredity, age and endocrine balance. The petitioner's witnesses claimed otherwise, asserting that a diseased condition of the scalp, known as seborrhea, was a dominant cause of baldness, and that the use of petitioners' products would have a salutary effect thereon.

Notwithstanding the fact that the Commission's own witnesses acknowledged the controversial nature of the issues presented as to the causes of baldness, the Hearing Examiner concluded that the Commission's contentions were supported by substantial evidence, that the petitioners' advertising was in violation of law, and that the decided cases required petitioners to make affirmative disclosures that their products would have no value in preventing baldness or excessive hair fall in the great majority of cases.

The proposed order to cease and desist was thereafter made final by the Commission and requires petitioners to refrain from advertising that their products will prevent or overcome excessive hair loss, induce new hair growth or improve the hair, unless their advertisements affirmatively state that in the case of "male pattern" baldness,

said products will be useless and that the great majority of cases of baldness are of the "male pattern" variety.

Petitioners thereafter appealed to the Court of Appeals which, on April 14, 1960, rendered an opinion affirming the determination of the Federal Trade Commission. On July 15, 1960, the Court of Appeals granted petitioners' motion for a stay of all enforcement proceedings of the order herein pending the determination by this Court of this application.

Reasons Relied on for Granting the Writ

1. The requirement of affirmative disclosure in the instant case violates the letter and spirit of the decision of the District of Columbia Circuit Court of Appeals in *Alberty* v. *Federal Trade Commission*, D. C. Cir., 1956, 182 F. 2d 36, and creates, in essence, a conflict between the rulings on the subject matter involved herein. In the *Alberty* case an affirmative disclosure requirement was stricken as invalid upon the ground that it constituted an abuse of the Commission's authority in the absence of evidence that the failure to make such affirmative disclosure would be misleading because of things claimed in the advertisement. It is the Commission's contention that the decision in the *Alberty* case does not govern the instant controversy because the evidence here meets the test laid down in the *Alberty* decision. In short, the Commission argues that the two decisions can be distinguished because of the presence in the case at bar of findings of fact supporting an affirmative disclosure requirement that were absent in the *Alberty* case. This suggested distinction between the cases is untenable. The fact remains that there

were specific findings in the *Alberty* case that closely parallel the findings here, and it is utterly incongruous to attempt to distinguish the two cases on the basis claimed. Inasmuch as the affirmative disclosure requirements were deemed to be improper upon the facts and findings in the *Alberty* case, it necessarily follows that the instant determination of the Court of Appeals in the Second Circuit conflicts with the ruling of the District of Columbia Court of Appeals as to the interpretation of the Federal Trade Commission Act and the limitations upon the right to require affirmative disclosures.

2. The case at Bar involves a departure from the accepted and usual course of judicial proceedings—a departure that appears to be almost fantastic in its destructive effect upon the property rights of the petitioners. A mere casual reading of the terms of the order to cease and desist discloses that the Commission's arbitrary choice between two conflicting medical theories as to the causes of baldness has been enlarged into a monstrous mandate requiring petitioners not only to proclaim one of such disputed scientific theories as a universal truth, but at the same time, to renounce and disclaim the other of such views despite its acceptance and endorsement by many highly respected dermatology specialists. Petitioners are therefore obliged, in effect, to disparage their own product and to demean the scope of its effective use to an extent that constitutes the taking of valuable property rights without the semblance of due process of law.

3. The question herein presented is of such importance as to warrant a determination by this Court. Although there has been a plethora of judicial proceedings against the Federal Trade Commission by advertisers of preparations for the treatment of baldness, a number of which cases have resulted in the denials of petitions for writs of

certiorari in this Court, no previous case of this nature has been subjected to an ultimate test of the constitutionality of the far-reaching and potentially devastating effect of the requirements of affirmative disclosure. It appears that orders to cease and desist similar to that involved in the case at bar were issued in *Erickson* v. *F. T. C.*, 272 F. 2d 318, cert. den. 362 U. S. 940; *Loesch* v. *F. T. C.*, 266 F. 2d 560, cert. den. 361 U. S. 914 and *Wybrant System Products Corp.* v. *F. T. C.*, 266 F. 2d 571, cert. den. 361 U. S. 883. However, in none of the cases last cited was the constitutionality and propriety of the affirmative disclosure provisions in the orders in question squarely raised and this Court does not appear to have ever expressed its views on the precise issue presented. Since this Court did not have occasion to review the well-considered opinion of the Court of Appeals in the *Alberty* case, and inasmuch as the Federal Trade Commission, with the sanction of the Courts of Appeals for the Second and Seventh Circuits, has since mandated advertising obligations in apparent conflict with the doctrine in the *Alberty* case, a clarification of the area involved is essential to the welfare of the innumerable individuals and business concerns affected by orders such as that complained of here.

Conclusion

For the reasons stated above, it is respectfully submitted that this petition should be granted.

Respectfully submitted.

MARTIN J. SCHEIMAN
Counsel for Petitioners
Time & Life Building
New York 20, New York

APPENDIX

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 118—October Term, 1959.

(Argued January 6, 1960 Decided April 14, 1960.)

Docket No. 25660

WARD LABORATORIES, INC., *et al.*,

Petitioners,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Petition to review an order of the Federal Trade Commission directing petitioners to cease and desist the dissemination of false and misleading advertisements.

Affirmed.

MARTIN J. SCHEIMAN, New York, N. Y., *for Petitioners.*

GERALD HARWOOD, Attorney, Federal Trade Commission, Washington, D. C. (Daniel J. McCauley, Jr., General Counsel, Alan B. Hobbes, Assistant General Counsel, Federal Trade Commission, Washington, D. C., on the brief), *for Respondent.*

Appendix

MOORE, *Circuit Judge*:

Petitioners, Ward Laboratories, Inc., Emile E. Kling, and Joseph J. Seldin, individually and as officers of Ward, Comate Laboratories, Inc. and Sebacin, Inc. seek to set aside an order of the Federal Trade Commission (FTC) requiring them to cease and desist from allegedly false advertising of preparations sold by them and represented, in substance, as: (1) preventing baldness; (2) causing the growth of new hair; and (3) preventing excessive hair fall.

Little purpose is served by reviewing the expert medical testimony. Four physicians, expert in dermatology were called by FTC; two and a biochemist and toxicologist by respondents (petitioners here). The hearing examiner most carefully analyzed the testimony of all experts. His conclusion that "In truth and in fact the most common cause of baldness is due to heredity, age and endocrine balance, commonly referred to as male pattern baldness; that this type of baldness constitutes 95% of all cases of baldness and regardless of the exact formula or the combination of the ingredients or preparations, or the methods of application of respondents' preparations, such will not remedy or cure the common cause, or a significant cause, of baldness; will not remedy or cure the common type of baldness; will not prevent baldness or partial baldness; will not cause the growth of new hair; and will not prevent excessive hair fall," is supported by substantial evidence. Having so concluded, the examiner molded the order to cease and desist in the manner best calculated to eliminate the deception contained in the advertising.

Petitioners now raise several points of alleged error. There is no merit in their contention that "the findings complained of were arbitrary and capricious" and were based on "a conglomeration of disputed theory and medical disagreement." It is indeed a rare case where medical experts are called which does not involve disagreement. Here,

however, the examiner is supported by clear and convincing testimony from well qualified witnesses. His decision and findings are the antithesis of "arbitrary and capricious."

The cease and desist order requires petitioners to disclose that their preparations will only be effective in baldness not of the male pattern variety and also to disclose that nearly all cases of baldness fall within the male pattern category.

Petitioners argue that "The provisions of the order requiring affirmative disclosure in petitioners' advertising are improper and unlawful." This argument presents a more difficult problem. Any requirement of an affirmative disclosure of a negative is always to be approached with caution. Merely because a remedy is useful for only one ailment is no reason to demand an accompanying statement of all the ills for which it is not beneficial. Even this principle, however, must yield where the advertisements are misleading because of failure to reveal facts material in the light of the representations made therein. In arriving at such a conclusion the advertisements (format and copy) and the potential customer they are intended to reach must be analyzed.

The customer is the average male, of which there are millions, who because of masculine vanity will grasp at any straw in the form of a remedy which will save his hair or stem the hair line retreat. He does not know (and probably cares less) whether he is a victim of baldness due to heredity, age, endocrine imbalance or whether his scalp, as petitioners suggest, may be the nesting place of "Millions of trouble-breeding bacteria" which are depicted by illustrations in the advertisements in the rather unphotogenic way in which bacteria usually photograph as "living on your sick scalp." Regardless of the cause the customer wants to save his hair. His eye will be caught by the dominant theme of the advertisements, i.e., "SAVE YOUR HAIR" and "BALD-

xess and what *you can do* about it." If the customer will "Try Ward's Formula" or, as to "COMATE," ask petitioners to "rush my bottle," he will be doing something about it and false hopes will be temporarily kindled. In fairness to petitioners it must be said that the advertisements do reveal in small type qualifying phrases, such as "these destructive scalp germs now recognized by many medical authorities as a significant cause of baldness" and "But many medical authorities now believe a specific scalp disease [seborrhea] is the most common cause of hair loss." This very statement, however, is contrary to substantial evidence that 90%-95% of all baldness does not result from these germ causes. Moreover, advertisements are not to be judged by their effect upon the scientific or legal mind which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words. Thus it is obvious here why some affirmative statement is necessary to dispel an otherwise misleading statement.

A fair reading of the advertisements, taking into account the various sizes of type, the stress placed upon certain words and the illustrations, make it essential for the protection of the public to incorporate in the order provisions to enforce the examiner's finding that "respondents' advertising is misleading because of failure to reveal the fact that in the great majority of cases, loss of hair or baldness is of the type known as male pattern baldness and that when baldness is of that type, respondents' preparations are of no value in the treatment thereof."

Alberta v. *Federal Trade Commission*, D. C. Cir., 1950, 182 F. 2d 36, heavily relied upon by respondents is not in conflict. In that case there were no findings as here that failure to make any affirmative statement in itself was misleading. It may well be that, as the court said in *Alberta*,

"the Commission goes far across the line when it attempts to require the advertiser of a drug admittedly beneficial in one ailment to state affirmatively that there are other ailments not reached by the drug" (182 F. 2d 36, 39). Here, however, petitioners' own advertising requires the antidote because it definitely intends to, and does, give the impression that baldness is largely caused by something which their preparations can cure.

The power of the FTC to require affirmative disclosure where necessary to prevent deception has long been recognized (*Waltrant Suction Products Corp.* v. *Federal Trade Commission*, 2 Cir., 1959, 266 F. 2d 571; *L. Heller & Sons* v. *Federal Trade Commission*, 7 Cir., 1951, 191 F. 2d 954; *Haskelite Manufacturing Co.* v. *Federal Trade Commission*, 7 Cir., 1942, 127 F. 2d 765).

The petition to review and set aside the order is denied, the FTC order is affirmed and an order shall issue as provided for in Federal Trade Commission Act, sec. 5(c), 52 Stat. 113, 15 U. S. C. A. 45(c).

Appendix

Final Decree

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 25660

WARD LABORATORIES, INC., *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST

Petitioners, Ward Laboratories, Inc., Emil E. Kling and Joseph J. Seldin, individually and as officers of Ward, Comate Laboratories, Inc. and Sebacin, Inc., having filed in this Court on May 12, 1959, a petition to review and set aside an order to cease and desist issued against them on March 4, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Ward Laboratories, Inc., et al., Docket No. 6346"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding;

and the matter having been heard by this Court on briefs and oral argument on January 6, 1960; and this Court having rendered its decision on April 14, 1960, affirming the aforesaid order to cease and desist issued by the Federal Trade Commission, respondent herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the aforesaid order to cease and desist be, and it hereby is denied, and that petitioners be, and they hereby are, commanded to obey said order to cease and desist and to comply therewith; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioners shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of aforesaid order to cease and desist, hereby enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

J. EDWARD LUMBARD
LEONARD P. MOORE
HENRY J. FRIENDLY

Dated: April 27, 1960